Mohd Nasir bin Moidu v Lee Swee Kim

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-1) 22–192 OF 1997
VERNON ONG J
27 AUGUST 2010

Land Law — Indefeasibility of title and interests — Fraud — Transfer of land — Whether transfer of title procured by fraud or fraudulent misrepresentation — Whether registration of title to land procured by forgery — Whether onus on plaintiff to prove that there was forgery — Whether proviso to s 340(3) of the National Land Code applicable — Whether title ought to be set aside — National Land Code s 340

The plaintiff was the registered owner of a piece of land situated in Johor Bahru ('the land'). Sometime in February 1990, the plaintiff had allegedly handed over the title deed to the land to one Ah Heng as security for a loan of RM100,000. The plaintiff alleged that the defendant conspired with the said Ah Heng to obtain the title deed from the plaintiff and that once she had possession of it had transferred the title in the land to herself without the plaintiff's knowledge or consent. The plaintiff denied signing any transfer form or sale and purchase agreement ('SPA) or acknowledgment voucher in receipt of RM100,000. The defendant claimed that she had acquired the land legally and that the sale and purchase transaction was handled by Messrs Tia & Noordin, a firm of advocates and solicitors ('the law firm'). According to the defendant, the plaintiff had agreed to sell the land to her for RM100,000 and that after she had paid the purchase price to the plaintiff on 1 January 1991, the latter had handed over the title deed and signed transfer documentation. The plaintiff commenced the instant civil suit against the defendant seeking a declaration that the transfer of the land to the defendant was null and void because his signatures on the transfer documentation were forged. It was the plaintiff's case that the defendant had obtained the title to the land by way of fraud and fraudulent misrepresentation. The plaintiff submitted that once he denied executing a document the onus was on the defendant to prove that the documents were executed by the plaintiff. The defendant submitted that there was no fraud involved and that the plaintiff had executed the transfer documents. The conveyancing clerk at the law firm, who had prepared the transfer documentation for the transfer of the land from the plaintiff to the defendant, testified that she had witnessed the plaintiff signing the transfer form, the SPA and the acknowledgment receipt. The lawyer from the law firm who handled the transaction testified that the plaintiff had come to his office because he wanted to sell the land and that the plaintiff had signed the SPA and the transfer documentation voluntarily and had taken receipt of the purchase

price of RM100,000. The plaintiff's sister testified that she had learned from her late husband that the plaintiff had handed over the title deed to the land as security for a loan of RM100,00 and that the plaintiff had informed her that the land had been transferred to the defendant illegally. The plaintiff relied on the evidence of a document examiner attached with the chemistry department to prove that the plaintiff's signatures on the SPA, the transfer and other related documents were forged, but the expert witness concluded that due to the lack of specimens it was possible that the questioned signatures and the specimen signatures were made by the plaintiff.

Held, dismissing the plaintiff's claim with costs:

(1) The existence of fraud is a question of fact that is dependant upon the circumstances of each particular case. In the instant case, apart from the plaintiff's own testimony there was no evidence to support or corroborate the plaintiff's allegations of fraud or fraudulent misrepresentation. The plaintiff's sister's evidence was substantially hearsay as she related what her late husband and the plaintiff had told her and did not have personal knowledge of the facts to which she testified to. The evidence of the defendant's witnesses, which was cogent, consistent and credible, did not shed any light in support of the plaintiff's allegation. As such the plaintiff had failed to satisfy both the burden of establishing a case and the burden of introducing cogent evidence to prove that the transfer of the title to the land in favour of the defendant was procured by fraud or fraudulent misrepresentation (see paras 7, 14–15).

(2) The plaintiff's submission that the defendant bore the burden of proving that the documents were executed by the plaintiff was misconceived. As it was the plaintiff who sought to set aside the defendant's title and interest in the land under s 340(3) of the National Land Code ('the NLC'), the onus of proof lay on the plaintiff to prove forgery on a balance of probabilities. The independent expert witness called by the plaintiff was found to be clear, consistent and credible and she was more inclined to believe that the plaintiff signed the documents. The testimonies of the conveyancing clerk at the law firm and the lawyer of the law firm who attended to the plaintiff, asserting that the plaintiff signed the documents in their presence at their office, identified the plaintiff as the person who signed the documents at the law firm. The clerk's evidence was corroborated by the lawyer. Thus, on the totality of the evidence and on a balance of probabilities it was found that the plaintiff's signatures on the documents were not forged (see paras 9–10).

(3) As fraud, fraudulent misrepresentation or forgery had not been established, the defendant's title and interest in the land was not liable to be set aside under s 340 of the NLC (see paras 10–11).

[Bahasa Malaysia summary

Plaintif adalah pemilik berdaftar sebidang tanah yang terletak di Johor Bahru ('tanah tersebut'). Dalam bulan Februari 1990, plaintif telah mendakwa menyerahkan surat ikatan hak milik tanah tersebut kepada seorang yang bernama Ah Heng sebagai sekuriti untuk pinjaman sebanyak RM100,000. Plaintif mendakwa bahawa defendan berkomplot dengan Ah Heng untuk memperoleh surat ikatan hak milik tersebut daripada plaintif dan apabila dia memilikinya telah memindahkan hak milik ke atas tanah tersebut kepada dirinya tanpa pengetahuan atau keizinan plaintif. Plaintif menafikan menandatangani apa-apa borang pindah milik atau perjanjian jual beli ('PJB') atau memaklumkan baucar penerimaan sebanyak RM100,000. Defendan menuntut bahawa dia memperoleh tanah secara sah dan bahawa transaksi jual beli tersebut diuruskan oleh Tetuan Tia & Noordin, firma peguamcara dan peguambela ('firma undang-undang tersebut'). Menurut defendan, plaintif telah bersetuju menjual tanah tersebut kepadanya dengan harga RM100,000 dan bahawa selepas dia membayar harga pembelian kepada plaintif pada 1 Januari 1991, plaintif telah menyerahkan surat ikatan hak milik dan menandatangani dokumen pindah milik. Plaintif memulakan tindakan sivil ini terhadap defendan dengan memohon perisytiharan bahawa pindah milik tanah tersebut kepada defendan adalah tidak sah dan terbatal kerana tandatangan-tandatangannya di atas dokumen pindah milik adalah palsu. Ia adalah kes plaintif bahawa defendan telah memperoleh hak milik ke atas tanah tersebut melalui pemalsuan dan salah nyata fraud. Plaintif berhujah bahawa apabila dia menafikan melaksanakan dokumen beban adalah ke atas defendan membuktikan bahawa dokumen-dokumen dilaksanakan oleh plaintif. Defendan berhujah bahawa tidak terdapat penipuan yang terlibat dan bahawa plaintif telah melaksanakan dokumen-dokumen pindah milik. Kerani pemindahhakkan di firma undang-undang tersebut, yang menyediakan dokumen pindah milik tersebut daripada plaintif kepada defendan, memberi keterangan bahawa dia telah menyaksikan yang plaintif menandatangani borang pindah milik tersebut, PJB dan pemakluman penerimaan. Peguam daripada firma undang-undang tersebut yang menguruskan transaksi tersebut memberi keterangan bahawa plaintif telah datang ke pejabatnya kerana dia hendak menjual tanah tersebut dan plaintif telah secara rela menandatangani PJB tersebut dan dokumen pindah milik tersebut dan telah menerima harga pembelian sebanyak RM100,000. Adik perempuan plaintif memberi keterangan bahawa dia telah mendapat tahu daripada arwah suaminya bahawa plaintif telah menyerahkan surat ikatan hak milik ke atas tanah tersebut sebagai sekuriti untuk pinjaman sebanyak RM100,000 dan bahawa plaintif telah memberitahu dia bahawa tanah tersebut telah dipindah milik kepada defendan secara tak sah. Plaintif bergantung ke atas keterangan pemeriksa dokumen yang berkhidmat dengan jabatan kimia untuk membuktikan bahawa tandatangan-tandatangan plaintif di atas PJB, pemindahan dan dokumen-dokumen berkaitan yang lain dipalsukan, tetapi saksi pakar

A memutuskan bahawa memandangkan ketiadaan spesimen ia berkemungkinan bahawa tandatangan-tandatangan yang dipersoalkan dan tandatangan-tandatangan spesimen tersebut adalah dibuat oleh plaintif.

B **Diputuskan**, menolak tuntutan plaintif dengan kos:

(1) Kewujudan fraud adalah soalan fakta yang bergantung atas keadaan-keadaan setiap kes tertentu. Dalam kes ini, selain daripada keterangan plaintif sendiri tidak terdapat keterangan untuk menyokong atau membenarkan tuduhan-tuduhan plaintif mengenai fraud atau salah
C nyata fraud. Keterangan saudara perempuan plaintif adalah sebahagian besarnya dengar cakap kerana dia menceritakan apa yang diberitahu kepadanya oleh arwah suami dan plaintif dan tidak mempunyai pengetahuan peribadi mengenai fakta di mana dia mengesahkannya. Keterangan saksi-saksi defendan yang mana adalah jelas, konsisten dan
D boleh dipercayai, tidak memberi sokongan kepada dakwaan plaintif. Oleh itu plaintif telah gagal untuk memenuhi kedua-dua beban membuktikan kes dan beban memperkenalkan keterangan jelas untuk membuktikan bahawa pindah milik hak ke atas tanah tersebut yang memihak kepada defendan diperoleh secara fraud atau salah nyata fraud
E (lihat perenggan 7–9).

(2) Hujahan plaintif bahawa defendan memikul beban membuktikan bahawa dokumen-dokumen dilaksanakan oleh plaintif adalah salah tanggap. Memandangkan plaintif yang memohon untuk mengenepikan
F hak milik dan kepentingan defendan ke atas tanah tersebut di bawah s 340(3) Kanun Tanah Negara ('KTN'), beban pembuktian disandarkan ke atas plaintif untuk membuktikan pemalsuan di atas imbangan kebarangkalian. Saksi pakar bebas yang dipanggil oleh plaintif didapati jelas, konsisten dan boleh dipercayai dan dia lebih ke arah mempercayai
G bahawa plaintif yang menandatangani dokumen-dokumen tersebut. Testimoni-testimoni kerani pemindahhakkan di firma undang-undang dan peguam firma undang-undang tersebut yang memberi khidmat kepada plaintif, menegaskan bahawa plaintif menandatangani dokumen-dokumen tersebut di hadapan mereka di pejabat mereka,
H mengenalpasti plaintif sebagai orang yang menandatangani dokumen-dokumen di firma undang-undang tersebut. Keterangan kerani disokong oleh peguam tersebut. Oleh itu, atas keseluruhan keterangan dan atas imbangan kebarangkalian didapati bahawa
I tandatangan-tandatangan plaintif di atas dokumen-dokumen tersebut tidak dipalsukan (lihat perenggan 9–10).

(3) Memandangkan fraud, salah nyata fraud atau pemalsuan tidak dibuktikan, hak milik dan kepentingan defendan ke atas tanah tersebut tidak boleh diketepikan di bawah s 340 KTN (lihat perenggan 10–11).]

Notes

For cases on fraud, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3067–3105.

Cases referred to

Abrath v North Eastern Railway Co (1883) 11 QBD 440 (refd)
Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (refd)
Appoo s/o Krishnan v Ellamah d/o Ramasamy [1974] 2 MLJ 201, HC (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62; [1997] 3 CLJ 17, CA (refd)
Chiew Lip Seng v Perwira Habib Bank Berhad [1999] 1 MLJ 310, HC (refd)
Chu Choon Moi v Ngan Sew Tin [1986] 1 MLJ 34, SC (refd)
Tan Chye Chew & Anor v Eastern Mining & Metals Company Limited [1965] 1 MLJ 201, FC (refd)
Dan Sin Wah v Chan Hai Swee [1951] MLJ 189, HC (refd)
Datuk Jagindar Singh v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)
Doe D Devine v Wilson (1855) 14 ER 581 (refd)
Goh Hooi Yin v Lim Teong Ghee [1990] 3 MLJ 23, HC (refd)
Jasbir Kaur & Anor v Tharumber Singh [1974] 1 MLJ 224, FC (refd)
Lee Cheong Fah v Soo Man Yoke [1996] 2 MLJ 627, HC
Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC (refd)
Narayanan Chettyar v Official Assignee, Rangoon 1941 AIR PC 93 (refd)
Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v Koh Kim Guan [1959] MLJ 173, HC (refd)
Owe Then Kooi v Au Thiam Seng & Anor [1990] 1 MLJ 234, HC (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)
Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd [1988] 3 MLJ 54, HC (refd)
Public Finance Bhd v Narayanasamy [1971] 2 MLJ 32, FC (refd)
Ratcliffe v Watters [1969] 2 NSWR 146 (refd)
Rejfek v McElroy (1965) 112 CLR 517, HC (refd)
Robertson v Keith (1870) 1 VR (E) 11 (refd)
Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)
Schultz v Corwill Properties Pty Ltd [1969] 2 NSWR 576 (refd)
Selvaduray v Chinniah [1939] MLJ 253, CA (refd)
State Tailor Sdn Bhd v Nallapan [2005] 2 MLJ 589, CA (refd)
Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd [1988] 3 MLJ 218, HC (refd)
Tai Lee Finance Company Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 82, FC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

A *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, SC (refd)

Legislation referred to

B Evidence Act 1950 ss 68, 101(1), 102
National Land Code s 340, 340(1), (2), (2)(b), (3), Form 14A

Mohd Fairuz Abdullah (Mohd Najid & Partners) for the plaintiff.
Badrol Hisham (Zainal & Badrol) for the defendant.

C **Vernon Ong J:**

[1] Mohd Nasir bin Moidu ('the plaintiff') was the registered owner of a
D piece of land. The plaintiff is seeking a declaration that the transfer of the land to Lee Swee Kim ('the defendant') is null and void because his signatures on the transfer documentation were forged.

THE PLAINTIFF'S CASE

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[2] The plaintiff was the registered owner of the land held under HS(M) 4755 Lot 1990 Mukim Tebrau Daerah Johor Bahru Negeri Johor ('the land'). The plaintiff's case is that the defendant obtained the title to the land through fraud and or fraudulent misrepresentation and or forgery. Sometime in
F February 1990 the plaintiff handed over the title deed to the land at a lawyer's office to one Ah Heng as security for a loan of RM100,000 given to his brother in law one En Abidin bin Kadamun. Ah Heng agreed to hold the title deed in trust and to return it to the plaintiff after Abidin repaid the loan.

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[3] In 1993 the plaintiff received a notice from the Inland Revenue Department asking him to submit a real property gains tax form. After receipt of the notice the plaintiff went to the lawyer's office to ask why the land had been transferred without his consent and knowledge. It was then the plaintiff
H was informed that the title to the land had been registered in favour of the defendant. The plaintiff denied signing any transfer form or sale and purchase agreement. He also denied signing an acknowledgement voucher in receipt of RM100,000. The plaintiff made a police report on 15 May 1995. The plaintiff's sister Puan Esah binti Maidin ('PW2') also gave evidence. PW2 said
I that her later husband ('Abidin') told her that he took a loan from a Chinese man in order to renovate the house. Abidin asked the plaintiff to give him the title deed to the land as security for the loan. The plaintiff agreed to hand over the title deed after being persuaded by PW2. Later Abidin told PW2 that he had obtained a loan from Ah Heng. In 1995 the plaintiff told PW2 that the

land had been transferred to the defendant illegally.

THE DEFENDANT'S CASE

[4] The defendant testified that in 1991 the plaintiff agreed to sell the land to her for RM100,000. She paid the purchase price to the plaintiff on 1 January 1991. After the purchase price was paid the plaintiff handed over the title deed and signed the transfer documentation. The transaction took place at the offices of Messrs Tia & Noordin, a firm of advocates and solicitors.

[5] Ms Ta Keh Bee ('DW2') worked as a conveyancing clerk at Messrs Tia & Noordin. DW2 said that the plaintiff wanted to sell the land to the defendant at RM100,000 and that Tia & Noordin were instructed to prepare the sale and purchase agreement and other transfer documentation. DW2 prepared the transfer documentation for the transfer of the land from the plaintiff to the defendant. DW2 was present when the plaintiff signed the transfer form, the sale and purchase agreement and the acknowledgement receipt

[6] Mr Tia Chak Yit @ Chai Chak Yit ('DW3') an advocate and solicitor testified that he only attested the signatures of the plaintiff and the defendant. The transaction was handled by his partner Hj Noordin. DW3 said that before he attested the documents DW2 had confirmed to him that the documents were signed by the parties.

[7] Haji Noor Din bin Hussin ('DW4') an advocate and solicitor testified that the plaintiff came to his office in 1991 because he wanted to sell the land. DW4 said that he instructed DVV2 to prepare the sale and purchase agreement. Both the plaintiff and the defendant signed the sale and purchase agreement and the transfer documentation in his office before him and DW2. DW4 said that the plaintiff signed the sale and purchase agreement and the transfer documentation voluntarily and that the plaintiff took receipt of the purchase price of RM100,000. DW4 also said that he and DW2 explained the transaction to both parties.

THE LAW

Indefeasibility of title under s 340 of the National Land Code

[8] According to s 340(1) of the NLC, a title which is registered is indefeasible in that it is free of all adverse claims or encumbrances not noted on the register. In other words, the registered title cannot be challenged by anyone. The indefeasibility of title is, however, not absolute. It may be set aside under

the following circumstances prescribed under s 340(2) of the NLC:

(a) in any case of *fraud or misrepresentation* to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by *forgery*, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. (Emphasis added.)

[9] The concept of indefeasibility has been restated and clarified succinctly in the recent landmark case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 (FC)where the Federal Court overruled the decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 (FC). In *Adorna Properties* , it was held, inter alia, that by virtue of the proviso to sub-s (3) of s 340 of the NLC, notwithstanding that the instrument of transfer was forged, any purchaser in good faith for valuable consideration is excluded from the application of the said provision so as to confer onto that category of proprietors immediate indefeasibility of title to the lands. The Federal Court in *Tan Ying Hong,* found that the error committed by the Federal Court in *Adorna Properties* , was to read the proviso to sub-s (3) as being a proviso to sub-s (2) of s 340 of the NLC as well. In so doing, the Federal Court in *Adorna Properties* , had recognised the concept of immediate indefeasibility under the NLC contrary to the provision of s 340. In *Tan Ying Hong* , the charge instruments in question were forged instruments and liable to be set aside under s 340(2)(b) of the NLC. As the third respondent was the immediate holder of those charges, it could not take advantage of the proviso to s 340(3) of the NLC because sub-s (3) did not apply to an immediate transferee of any title or interest in land. The basic principles distilled from the Federal Court's decision may be summarised as follows:

(a) Indefeasibility of title or interest in land can be immediate or deferred.

(b) s 340 of the NLC conferred deferred indefeasibility as opposed to immediate indefeasibility.

(c) The indefeasibility of any immediate transferee whose registered interest or title was obtained by fraud, fraudulent misrepresentation and or forgery is deferred.

(d) Subsection (3) of s 340 of the NLC did not apply to an immediate transferee of any title or interest in land. It is only applicable to a holder of a subsequent interest or title, ie, a subsequent transferee claiming through or under the immediate transferee whose interest or title is

defeasible.

Fraud

[10] The plaintiff's contention is that the defendant obtained the title to the land by way of fraud and or fraudulent misrepresentation. For the purposes of vitiating title to land under s 340 of the NLC the fraud must be actual fraud. What is fraud? It is impossible to lay down a complete and comprehensive definition of fraud as the range of fraud is infinite. The existence of fraud is a question of fact. It is dependent upon the circumstances of each particular case (*PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 (FC)). Examples of actual fraud may be found in decided cases (see *Loke Yew v Port Swettenham Rubber Company Limited* [1913] AC 491; *Dan Sin Wah v Chan Hai Swee* [1951] MLJ 189; *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32; *Jasbir Kaur & Anor v Tharumber Singh* [1974] 1 MLJ 224; *Appoo s/o Krishnan v Ellamah d/o Ramasamy* [1974] 2 MLJ 201; *Owe Then Kooi v Au Thiam Seng & Anor* [1990] 1 MLJ 234). Actual fraud is where one person causes pecuniary injury to another by intentionally misrepresenting or concealing a material fact which from their mutual position he was bound to explain or disclose. If a person by intentional misrepresentation or concealment of a material fact peculiarly within his knowledge induces another person to enter into a contract, conveyance or similar transaction with him, which he would not have entered into had he known the truth, the contract or other transaction is fraudulent (*Jowitt's Dictionary of English Law* (2nd Ed)). In order to render an indefeasible title defeasible it is necessary to prove actual fraud (see *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54). In this context actual fraud means dishonesty of some sort where the designed object of a transfer is to cheat a person of an existing right or whether by a deliberate and dishonest act a person is deprived of his existing right (see *Datuk Jagindar Singh v Tara Rajaratnam* [1983] 2 MLJ 196; *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 and *Robertson v Keith* (1870) 1 VR (E) 11). The fraud must be that of the registered proprietor or his privy. The fraud of an agent will affect the principal who is the registered proprietor unless the agent acted outside his authority (*Schultz v Corwill Properties Pty Ltd* [1969] 2 NSWR 576; *Ratcliffe v Watters* [1969] 2 NSWR 146).

Fraud — burden and standard of proof in civil proceedings

[11] In this case the onus is upon the plaintiff to establish the alleged fraud. The standard of proof is that of proof beyond reasonable doubt (*Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17

(CA); *Narayanan Chettyar v Official Assignee, Rangoon* 1941 AIR PC 93 at p 95 applied in the Singapore High Court in *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v Koh Kim Guan* [1959] MLJ 173; *Tai Lee Finance Company Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 82 (FC); *Saminathan v Pappa* [1981] 1 MLJ 121; *Tan Chye Chew & Anor v Eastern Mining & Metals Company Limited* [1965] 1 MLJ 201 (FC)).

[12] Proof beyond reasonable doubt does not, however, mean proof beyond the shadow of doubt. The degree of proof must carry a high degree of probability so that on the evidence adduced the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt (see *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 at p 38 (SC); *Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627; *Goh Hooi Yin v Lim Teong Ghee* [1990] 3 MLJ 23).

Forgery

[13] According to Judith Sihombing in *The National Land Code — A Commentary* (Vol 2) para 3354, forgery involves fraud. However, the fraud is not always that of the party obtaining registration by the use of the forged instrument. Forgery involves the dishonest misuse of the name of the registered proprietor (or of a party seeking without fault to take from the registered proprietor) or of factors relevant to the transaction where the name, details, or other information of the party are counterfeited by a rogue or someone intending to act dishonestly in so counterfeiting the signature and also usually intending to achieve some benefit for himself.

Forgery — burden and standard of proof in civil proceedings

[14] In this case the onus is also upon the plaintiff to establish the alleged forgery. The standard of proof of forgery in civil proceedings falls within the general rule of the common law that in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities (*Rejfek v McElroy* (1965) 112 CLR 517 (HC) Australia). As adverted to above the common law of Malaysia has provided an exception to this rule in the case of fraud so that the proof of fraud in civil proceedings is beyond reasonable doubt. It is now settled law that forgery need only be established on a balance of probabilities (*Doe D Devine v Wilson* (1855) 14 ER 581 at p 592 (PC); *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 (SC); *Syarikat Islamiyah v*

Bank Bumiputra Malaysia Bhd [1988] 3 MLJ 218).

Legal and evidential burden of proof

[15] In the light of the above mentioned, the burden of proof to establish fraud, fraudulent misrepresentation and or forgery rests upon the plaintiff (s 101(1) of the Evidence Act 1950). The burden of proof on the plaintiff is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the plaintiff throughout the trial. The evidential burden of proof is only shifted to the defendant once that the plaintiff has discharged his burden of proof. If the plaintiff fails to discharge the original burden of proof, then the defendant need not adduce any evidence. Therefore, it is the plaintiff who must establish his case. If he fails to do so, it will not do for the plaintiff to say that the defendant has not established her defence (*Selvaduray v Chinniah* [1939] MLJ 253 (CA); s 102 of the Evidence Act 1950).

[16] It is, however, not enough for the plaintiff to establish a prima facie case at the close of his case. The plaintiff must also establish at the conclusion of the trial that his case is stronger than that of the defendant's. If, at the conclusion of the trial the court finds that the position was evenly balanced, then the plaintiff would have failed to discharge the burden of proof required of him. On the effect of the burden of proof not being discharged, Terrell Ag CJ in *Selvaduray v Chinniah* , adopting the position stated by the Court of Appeal in *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 said:

> In such a case as the present the position has been clearly stated in the judgment of Brett MR in *Abrath v North Eastern Railway Co* (1883) 11 QBD 440 at p 452:
>
> > But then it is contended (I think fallaciously), that if the plaintiff has given prima facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to this. It seems to me that the propositions ought to be stated thus: the plaintiff may give prima facie evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both

> sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

Applying the principles laid down by the Court of Appeal in the above case, it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial the learned judge has found that the position was exactly even, ie that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose if he can satisfy the court that the plaintiff has not established his case and the learned judge has so found.

FINDINGS OF THE COURT

Whether the transfer of the title to the land in favour of the defendant was procured by fraud or fraudulent misrepresentation

[17] According to the statement of claim the defendant conspired with Ah Heng to ask for the title deed from the plaintiff. Once the defendant had possession of the title deed the defendant transferred the title in the land to herself without the plaintiff's knowledge or consent. The defendant knew that she was at all material times holding the title deed in trust for the plaintiff. It is also pleaded that the defendant fraudulently misrepresented to the Registrar of Land Titles Johor that (i) the defendant has paid the consideration for the transfer of the land; and (ii) the transfer form was signed by the plaintiff and that the plaintiff agreed to the transfer in favour of the defendant. Further, the plaintiff also contends that the defendant fraudulently misrepresented to the

Valuation Department and or Inland Revenue Board that the plaintiff had signed the assessment form (PDS15), sale and purchase agreement and related documents.

[18] Apart from the plaintiff's own testimony, there is no evidence to support or corroborate the plaintiff's allegations of fraud or fraudulent misrepresentation. PW2's evidence is substantially hearsay as she related what her late husband and the plaintiff told her. PW2 did not have any personal knowledge of the facts to which she testified to. The cross-examination of the defendant, DW2, DW3 and DW4 did not shed any light in support of the plaintiff's allegation. On the whole, the evidence of DW2, DW3 and DW4 were cogent, consistent and credible. The evidence in support of the plaintiff's allegations fall far short of the high degree of probability required. As the plaintiff has failed to satisfy both the burden of establishing a case and the burden of introducing cogent, direct and incontrovertible evidence, the question is answered in the negative.

Whether the registration of the title to the land in the defendant's favour was procured by forgery

[19] Learned counsel for the plaintiff submitted that where a person denies executing a document, the onus is on the party wishing to rely on that document was executed by that person (s 68 of the Evidence Act 1950; *Chiew Lip Seng v Perwira Habib Bank Berhad* [1999] 1 MLJ 310). Thus, it was submitted that it is the defendant who bears the burden of proving that the documents were executed by the plaintiff. Learned counsel for the plaintiff also argued that the defendant cannot assert that she is a bona fide purchaser for valuable consideration as that fact is not pleaded (*State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589). With respect, the plaintiff's submission is misconceived. As it is the plaintiff who seeks to set aside the defendant's title and interest in the land under s 340(3) of the NLC the onus of proof lies on the plaintiff to prove forgery on a balance of probabilities.

[20] It is pleaded that the defendant by herself or conspired with others to forge the plaintiff's signatures on the Form 14A, the PDS15, sale and purchase agreement and other related documents. Apart from the plaintiff's denial that he signed the said documents, the plaintiff also relied on the evidence of Ms Santi a/p Chelliah ('PW3') a document examiner attached with the Chemistry Department, Petaling Jaya. PW3 examined the questioned signatures in the three documents pertaining to the transfer of the land from the plaintiff to the defendant, namely (i) Form 14A ('Q1a'), (ii) the sale and

purchase agreement ('Q2a'); and (iii) an acknowledgement receipt ('Q3a'). PW3 also examined the plaintiff's specimen signatures contained in various documents. In her report ('exh P5') PW3 concluded that:

> On comparison, I found that the questioned signatures 'Q1a', 'Q2a' and 'Q3a' showed some similarities in handwriting characteristics with the specimen signatures 'S'. Hence, I am of the opinion that the possibility that these questioned signatures were written by the writer of the specimen could not be ruled out.

[21] In her testimony, PW3 elaborated that if there are significant differences, the questioned signatures can be categorised as 'not written'; conversely, if there are significant similarities, they can be categorised as 'written'. PW3 added that if there are differences but limitations due to the amount or dating of specimens, then the questioned signatures can be categorised as 'probably'. Lastly, PW3 also said that if there are some similarities or some differences coupled with some limitation, the questioned signatures will fall into the 'possibility' category. PW3 concluded that due to the lack of specimens in this case, the possibility that the plaintiff made the signatures cannot be ruled out; that it is possible the questioned signatures and the specimen signatures are made by the plaintiff. Under cross-examination PW3 said that she was more inclined to believe that the plaintiff signed the documents.

[22] PW3 is an independent expert witness called by the plaintiff. PW3 took the view that it was possible that the plaintiff signed the Form 14A, the sale and purchase agreement and the acknowledgement receipt. The court finds PW3's evidence to be clear, consistent and credible. The court also examined the testimonies of DW2 and DW4 asserting that the plaintiff signed the documents in their presence at their office. DW2 a senior conveyancing clerk identified the plaintiff as the person who signed the documents at her office. DW2 said that DW4 was the lawyer who attended to the transaction and that DW4 explained the transaction to the plaintiff and the defendant at the office. DW2's evidence is corroborated by DW4. DW4 said that the sale of the land was a straight forward sale and purchase where plaintiff acknowledged receipt of the purchase price of RM100,000.

[23] Whether a fact is proved or not depends on the degree of probability of the existence or non-existence of that fact. On the totality of the evidence and on a balance of probabilities the court finds that it is unlikely that the plaintiff's signatures on the documents were forged. Accordingly, it question is answered in the negative.

[24] As fraud, fraudulent misrepresentation and or forgery have not been established, the defendant's title and interest in the land is not liable to be set aside under s 340 of the NLC. In the premises the plaintiff's claim is dismissed with costs of RM12,000.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan